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Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2000

JOSE ANTONIO GUZMAN, *Petitioner*

v.

FEDERAL EXPRESS CORP., *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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June 25, 2001

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QUESTIONS PRESENTED

1. Is an employee, who is precluded from performing his regular job because of an epileptic seizure, "regarded as disabled from working" under the American's with Disabilities Act ("ADA") when the employer subsequently denies him numerous other open jobs at the company that he is capable of performing?

2. Did this Court, in its decision in *Murphy v. United Parcel Service*, (holding that Murphy was not "regarded as disabled from working" because he was denied only a single driving job), sanction such a refusal to consider the employee for a large number of the Company's other open jobs?

LIST OF PARTIES

The parties to the proceeding below were the petitioner, Jose Antonio Guzman and the respondent, Federal Express Corp.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLES OF CONTENTS iii

TABLES OF AUTHORITIES iv

OPINIONS BELOW 2

JURISDICTION 2

STATUTE INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 18

CONCLUSION 26

CERTIFICATE OF SERVICE 28

APPENDIX A-1-C-2

TABLE OF AUTHORITIES

FEDERAL CASES

Murphy v. UPS, 119 S. Ct. 2133 (1999) 20

Sutton v. United Airlines, Inc., 119 S. Ct. 2139 (1999) 18

FEDERAL STATUTES

15 U.S.C. § 1681b(g) 23

28 U.S.C. § 1254(1) 2

29 C.F.R. 1630.8 22

42 U.S.C. 121.02(2)(C) 18

42 U.S.C. § 12102(2) 2

42 U.S.C. § 12112(a) 2

EEOC Reg. 29 C.F.R. 1630.14(d)(1) 22

UNRECOGNIZED

52 Ala, Law Review 321 (2000) 25

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The Petitioner, Jose Antonio Guzman ("Guzman") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, which, after Motion for Rehearing was entered in the above-entitled proceeding on March 29, 2001.

OPINIONS BELOW

The opinion of the Courts below are not as yet reported. The opinions are reproduced in the Appendix hereto.

JURISDICTION

Petitioner sued under 42 U.S.C. § 12112(a) of the Americans' with Disabilities Act ("ADA") in the Northern District of Texas. The Court granted Respondent's Motion for Summary Judgment on August 28, 2000. Petitioner duly filed his Notice of Appeal to the Fifth Circuit and it entered its Opinion on March 2, 2001 affirming the District Court's judgment. Petitioner timely filed a Motion for Rehearing, which was denied on March 29, 2001.

The jurisdiction of the Court to review the judgment of the Fifth Circuit is 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. § 12102(2) as follows:

"(2) Disability

The term "disability" means, with respect to an individual –

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment."

STATEMENT OF THE CASE

At the time of his termination, Guzman had been a permanent full-time employee of FedEx for eighteen (18) years, and in recent years held the position of "truck driver." He had held many of Fed Ex's non-driving jobs in prior years and thus had familiarity with the duties of most of the other permanent jobs the Company had in the Dallas area. (R. 755-758, 761.)[1]

On February 15, 1998, while asleep at home, Guzman had an apparent seizure that was observed by

[1] The Record is designated R.

his girlfriend. He was hospitalized for observation for one (1) day and then referred to a neurologist for evaluation and treatment. The neurologist recommended that Guzman be placed on medication, stating he believed Guzman "probably has a seizure disorder" and that Guzman "should limit professional driving until we have control, at least for two years." (R. 699 - 700.) Guzman was placed on medication, and was released to return to work on March 13, 1998, in a "non-driving position and only in day time hours." (R. 702.) This medical information was properly furnished to the Company. (R. 688) This restriction on driving complied with the requirement of the Texas Department of Public Safety, which prevents the driving of trucks for a two (2) year period following any seizure. Since he could no longer perform his truck driving job the Company placed him on its short-term disability

plan.[2] Guzman did not believe that, simply because he could not drive, that he was disabled, and he promptly took steps to try to find a non-driving job that was open that he was capable of performing. (R. 755).

The Company's Capital Resource Manager, Val Parrish ("Parrish") is responsible for managing employees on medical leaves of absence which included the responsibility of trying to help them get back to work. (R. 714 - 716.) Parrish wrote Guzman a form letter on March 19, 1998, placing him on disability pay and explaining the Company's disability leave program. It instructed him to maintain contact with her at least

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[2] The Company's disability program provided for short-term disability for six (6) months paid for by the Company and at the end of the six (6) months (if the employee is still disabled) the employee is placed on long-term disability, which is administered by Kemper Insurance Company. (R. 764-769.) Both programs pay only sixty percent (60%) of the employees' regular weekly wage, based on forty (40) hour workweek.

once a week and informed him that it was his responsibility to stay informed of vacant jobs which were posed at the Company's various locations in Dallas. (R. 615 - 617.) (Such letter thus confirms that the Company knew he was capable of performing its other non-driving jobs.)

Guzman had conversations with Parrish on numerous occasions, in which he told her he wanted to go back to work in a non-driving job, and he requested that she help him find any full-time permanent job within the Company that did not require driving. (R. 692 - 695, 722, 724, 726.) Guzman did not wait for her to locate such an opening and, as instructed, he began to inquire about such jobs on his own. He testified that he discovered several job openings that he could perform and he had various discussions with Parrish and other management officials about his desire to fill these job openings. In particular, he testified that:

(1) Upon his release to return to work on March 13, he requested permission from Parrish to bid on an open full-time customer service position under Vickie Cantrell ("Cantrell"), a senior manager at a location different then his former one. Parrish denied the request, stating as the reason, that there was too much paperwork involved in transferring Guzman from his old workstation to a new one. This was the only reason given to Guzman for denial of his request to bid on the job. (R. 646 - 647.)

(2) A week or two later, another customer service position under Cantrell became available and Guzman again applied verbally to Parrish and Cantrell. Cantrell told him she had been told to stay out of the process and not to become involved. Parrish denied this second request also, stating as the reason that another employee who was then working nights had bid for and was being granted the position, which was a day job.

The person who received the job had less seniority than Guzman, and no other reason was given for denying Guzman the job. (R. 647.)

(3) In August, Guzman inquired of Robert Center ("Center") and Kim Senstrund ("Senstrund"), both supervisors, about three (3) non-driving positions that became available. He was told not to waste his time bidding on these jobs because others had already been selected to fill them and the Company was "just going through the procedures" by posting them for bid. (R. 647-649.)

Guzman testified that he continued to check the postings every week and a half to two weeks, but sometimes the booklets containing the list of openings were missing at various locations. When he reported the missing booklets to Parrish, she told him he was obligated to continue the pursuit for jobs himself and she gave him no job leads nor did she obtain and furnish

new copies of the booklets for him. (R. 650.) From March 13, 1998 through November 10, 1998, Guzman had gotten no leads from Parrish, and had been denied the opportunity to fill or bid on every position he himself had located.

Finally, on November 10, 1998, one of the Company managers, Teresa Williams ("Williams"), wrote a letter to Guzman offering him a job as a full-time heavy weight handler at a different location from that in which he had previously worked. (R. 650, 704.) This was the same type work Guzman had been doing as a driver - without the driving duty. (R. 652.) He would have accepted this job, except for certain conditions attached to the offer, as contained in the letter, and an additional condition that was stated to Guzman verbally by Gil Garcia ("Garcia") (who was to be the immediate supervisor). The letter stated that by accepting the job, he would be making a commitment to

remain in that department for 18 months, and that he would not be able to bid for a more advantageous shift for a period of six (6) months. (The 18 months would have extended beyond his driving disqualification, if he had experienced no additional seizure.) He was also told verbally by Garcia that he would be on probation for thirty (30) days (R652) the same as a new employee! Guzman testified that in his eighteen (18) years of experience the eighteen (18) month bidding restriction was not normal, and that the "probation" requirement was unheard of. (R 651-652) Throughout this entire time, he had remained on disability status and disability pay.

Because the Company had shown so little interest in assisting him to find a full-time job, and because of the unusual restrictions placed upon him if he accepted the one that had finally been offered, Guzman contacted an attorney, Durwood Crawford ("Crawford"), for

assistance. Consequently, a letter was written on November 18, 1998, by Crawford to the Company specifying why the conditions under which Guzman was offered the heavy weight handler job were unacceptable. (R 625). Crawford's letter also pointed out that Guzman had performed many non-driving functions for the Company in his eighteen (18) years and it asked the Company to contact either Crawford or Guzman to discuss the type jobs he was able to perform. The letter made clear that Guzman wanted a full-time permanent job without such unusual conditions attached. The Company never responded to this letter, either to Guzman or to Crawford!

Parrish wrote to Guzman on December 10, 1998, requesting an update on his medical condition (R. 627) to justify his disability leave and pay, but making no mention of Crawford's letter of November 18, 1998. After Parrish had written Guzman, asking him for

medical confirmation of his disability status, Crawford wrote to Parrish again confirming Guzman's desire to get off disability pay and into a non-driving job, stating:

> "You are asking Mr. Guzman to substantiate his leave status, while we are trying to help Mr. Guzman return to active work - which is his desire!" (R. 770.)

No reply was received to this letter either!

Having had no response to his attorney's letters, and concluding that he was being barred from any and all full-time jobs, Plaintiff filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") on January 11, 1999, stating:

> "I believe....the Company regards me as a person with a disability, in violation of The Americans With Disabilities Act of 1990 in that I have been denied the opportunity to return to work in a full-time non-driving position." (R. 662.)

There can be no question but what he was willing and able to take any full-time non-driving job (without abnormal conditions being attached) and had applied for all those he could locate. He had been turned down for every one of those he located.

Almost a year after his suspected seizure, on March 8, 1999, Guzman received an overnight letter from Parrish stating he had failed to respond to her alleged attempts to telephone him. It stated that he fell under the Company's Temporary Return to Work ("TRW") Program, that a temporary job had been found for him with Williams, and that he was scheduled to report to work on March 10, 1999. (R 602, 629) Employees in the TRW Program (R. 710 - 711) are allowed to work a maximum of 24 hours a week, thus earning the same amount they receive while on disability (60% of their regular straight time pay). Parrish's letter further stated that acceptance of the

temporary job was required, and that failure to participate in the TRW program would lead to termination. (R 629)

A major unanswered question for Guzman arose because the Company Policy stated that such temporary positions existed for only 90 days, and he wanted to know what happened to his employment status after the ninety (90) days. The Company Policy, which was quoted in the letter to him, states that the "placement will not exceed 90 days" (R 608) and it does not state what will happen to the employee after the 90 days! (R. 771) Guzman was aware that other employees, with whom he was acquainted, had accepted similar temporary assignments, then had their "permanent" classification changed to "temporary" and were then

terminated at the end of the 90 days. (R. 690.)[3] (It was also classed as a part-time job and it is acknowledged by FedEx that part time employees do not have benefits comparable to full time employees.) (R 722-723) Since the quoted Policy itself did not address what happens at the end of 90 days, Guzman wanted and attempted to get an answer to this and other questions about his status if he took the job. (R. 694 - 695.) On March 12, 1999, Guzman actually went to the location and met with Williams to determine the details of the proposed assignment and ask her his questions about his status if he took it. Williams was not expecting Guzman at that time (she did not even know who Guzman was) and she could not answer any of Guzman's questions. Williams called Parrish while Guzman was there. Guzman

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[3] Guzman had served on the Company's committee under The Guaranteed Fair Treatment Program and had personally dealt with cases which involved such events. (R. 690 - 691)

wanted to get his attorney on the line but Parrish refused. (R657) The meeting ended, without his questions being answered.

Because of these concerns and Guzman's inability to get answers, Crawford tried again and immediately wrote to Parrish, on March 15, 1999, stating, among other things:

> "For reasons explained to Ms. Williams by Mr. Guzman, there are too many unanswered questions for him to accept the part-time, temporary position that has been offered.
>
> Mr. Guzman wants to return to a full-time job with full-time benefits and is capable of doing so. Under the current offer he would only be working twenty-four (24) hours per week at an unknown rate of pay. Furthermore, the job is classified as temporary.
>
> We hope that Federal Express will search for a full-time position for Mr. Guzman so that he may return to work. Please contact me or Mr. Guzman when you

> have located such a position." (R. 708.)

No response was received to this letter or any other of Crawford's letter by either Guzman or Crawford!

Discovery served on FedEx after the filing of suit showed that Williams had sent an e-mail to Parrish's assistant on March 16, 1999 (right after Crawford's letter) that makes crystal clear that the Company's motive, for the next series of letters, was to terminate Guzman. It stated:

> "Thanks for the info.....very interesting. I will let Val (Parrish) know and check into what steps to take next. Since TRW is mandatory if there is a light-duty release we may be able to terminate now but we want to be sure to get it right." (Emphasis added.) (R. 751)

To "get it right" Parrish wrote Guzman again on March 24, 1999, referring to her first letter to him of March 8, 1999. It did not answer the key question about his status at the end of 90 days. In essence, she repeated

that the TRW assignment was not voluntary, that he must participate and that if he did not, he would be subject to termination. It gave him one last opportunity to report for the TRW duty, two (2) days later on March 26, 1999. (R. 633 - 634.)

Crawford immediately responded to Parrish, again explaining that Guzman was capable of working any full-time position other than one requiring driving, and pointed out that the temporary part-time assignment potentially penalizes a full-time employee. It further pointed out that on March 25, 1999, Guzman had now filed a lawsuit as a result of the Company's "regarding him as disabled". (R. 635 - 636.)

On March 31, 1999, Parrish wrote Guzman and informed him that his employment was terminated. In her deposition, Parrish categorized his actions as "insubordination." (R. 717.)

On April 9, 1999, Guzman filed a new EEOC Charge, alleging retaliation by the Company by terminating him because he had filed the previous EEOC Charge. (R. 749.). The lawsuit was later amended, by permission of the Court, to add the retaliation claim.

REASONS FOR GRANTING THE WRIT

The decisions of the Courts below demonstrated confusion as to this Court's holding in *Murphy v. UPS*, and, without clarification from this Court, a major portion of the ADA will be rendered meaningless.

The Company's action, in denying Guzman any full-time permanent job after he was disqualified from his driving job, illustrates exactly why congress added the "regarded as" section, under the definition of the term "disability", in the ADA. 42 U.S.C. 121.02(2)(C)

Congress' intent in so doing was accurately summarized by this Court in *Sutton v. United Airlines, Inc.*, 119 S.Ct. 2139 (1999) p. 2150; where it was stated (quoting from a prior case of the Court):

> "By amending the definition of 'handicapped individual' to include not only those who are actually physically impaired, but also those who are regarded as impaired and who, as a result, are substantially limited in a major life activity, Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment."

Guzman encountered exactly this type of prohibited conduct! Although he was disqualified from performing his truck driving job because of the seizure, he could perform a large number of other jobs for FedEx that he had performed before he became a driver. Various jobs of these types became open during the time period between March 13, 1998 and the restricting job

offer letter of November 10, 1998, but he was uniformly denied the opportunity to bid on such jobs and the offer of November 10, 1998 was knowingly designed to be unacceptable to him.

This case presents a classic case of a company yielding to "myths and fears" to totally disqualify an employee from all its jobs. The statute itself and the EEOC Regulations clearly forbid this type conduct, but this Court's decision in *Murphy v. UPS,* 119 S.Ct. 2133 (1999) created confusion for the District Court and for the Fifth Circuit. Thus, summary judgment was entered for FedEx based on *Murphy*. The District Court held:

> "In light of *Murphy*, this case becomes a proverbial slam-dunk in favor of Defendant. Ironically, Plaintiff states in his Response to Defendant's Motion for Summary Judgment that "Defendant has *never claimed* that Plaintiff was incapable of performing these other jobs and it cannot be denied that he made numerous requests for such a job." (Emphasis added) In other words, Plaintiff has just admitted, in so many

> words, that Defendant did not regard Plaintiff as being disabled.
>
> Plaintiff argues instead that Defendant was required to make an effort to find other jobs for Plaintiff. The Court offers two responses to this argument. First, nowhere in *Murphy* did the Supreme Court mention that UPS was required to find Murphy a mechanic position which did not require operating a commercial motor vehicle."

The Trial Court clearly did not understand that *Murphy* dealt with only a single job and that the entire purpose of the "regarded as" section of the definition is defeated if the employer can ban the employee with an impediment from all its jobs because he has an infirmity that prevents him from performing his single job. The Fifth Circuit reached the identical conclusion when it read *Murphy* and cited it as conclusive authority for the proposition that, as a matter of law, FedEx did not regard Guzman as disabled. The *Murphy* case, when correctly read, says no such thing, but it is imperative that this Court grant this Writ and clarify that such

conduct by a Company violates one of the most fundamental purposes of the ADA!

To prevent the disabling effect of "society's myths and fears" the ADA and the EEOC created numerous safeguards. The ADA restricted employers from asking job applicants about their past medical history - believing that such questions would, because of "myths and fears," result in job denials. [Sec. 12112(d)(1); (2)] That Section further precluded pre-offer medical examinations. The EEOC Regulations even require the maintenance of medical records of employees in separate files with limited access by managers. EEOC Reg. 29 CFR 1630.14(d)(1) Likewise, the definition of "disability" includes and protects those with a "record" of a disability. Going even further, the Regulations preclude the denial of jobs to qualified individuals who have a "family, business, social or other relationship" with someone with a disability. (29 C.F.R.

1630.8.) These provisions (and others) have the same identical purpose as the "regarded as " prong of the ADA - to make employers set aside "society's myths and fears" and make their employment decisions based strictly on the individual's ability to perform the job.[4]

Treatment like Guzman received was not sanctioned by this Court in *Murphy* as the lower Courts believed. In that case the issue was whether Murphy's disqualification from the single job of truck driving qualified him as a person with a disability under the "working" category of the EEOC Regulations. The holding was, as previously held in many lower court cases, that he did not show that he was viewed as being

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[4] A like prohibition against disclosing medical information is even found in the Fair Credit Reporting Act, which limits information provided by credit reporting agencies for employment purposes. 15 USC § 1681b(g).

disqualified from a broad range of jobs because of his infirmity. See *Murphy*, p. 2139.

In contrast, Guzman listed in the summary judgment record numerous non-driving jobs that he had previously held and many types of these jobs came open, which he unsuccessfully tried to obtain. Rather than give him such a job, the Company insisted on carrying him as "disabled" on its disability plan. The important and distinguishing point, that he tried to make to both Courts below, was that it was these numerous refusals of many types of jobs - not his disqualification from this truck driving job - which formed the basis for his belief that he was "regarded as" disabled from "working" by the Company. This evidence should have provided a "slam dunk" that he was so regarded as disabled from "working", (because it included a broad range of jobs), not a "slam dunk"

summary judgment against him. Clarification of what this Court meant in the *Murphy* case is clearly needed!

It is quite likely that the lower Courts' mistake arose, because in the *Sutton* and *Murphy* decisions, this Court raised a question about the validity of the EEOC's definition of "working" as a major life function. (See discussion in *Sutton*, p. 2150-2152.) One writer was prompted to thereafter entitle an article "The Supreme Court's Definition of Disability Under the ADA: A Return to the Dark Ages". 52 Ala, Law Review 321 (2000). While difficulties may arise in some cases in applying "working" as a major life function, there is absolutely no difficulty in circumstances, as here, where a company has numerous types of jobs, and thousands of employees, yet establishes an absolute blockade against obtaining those jobs for employees who have medical infirmities - but which do not prevent the

performance of the job. The only thing preventing job performance is the Company's "myths and fears".

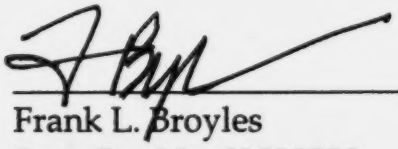
Guzman does not agree that *Sutton* or *Murphy*, when properly read, signal a return to the "Dark Ages" but when read, as done here by the lower Courts, that is exactly the result! As applied by the District Court and Fifth Circuit, employers can react to injuries and infirmities and exclude applicants/employees from all of a Company's jobs based on "society's myths and fears", just like they could prior to the passage of the ADA.

CONCLUSION

The Court is respectfully urged to accept jurisdiction of this case and clarify that practices that uniformly exclude individuals with infirmities from a broad range of a Company's jobs qualify such persons as being "regarded as disabled" from "working" and thus they are entitled to the protection of the ADA.

With such a clarification of the applicable legal standards, Guzman has raised fact issues which preclude summary judgment and require a remand of this case for Trial.

Respectfully submitted,



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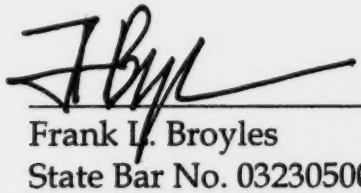
CERTIFICATE OF SERVICE

I, Frank L. Broyles, a member of the Bar of this Court, hereby certify that on this 25 day of June, 2001, three copies of the Petition for Writ of Certiorari in the above-entitled case were mailed, first class postage prepaid, to Sean Higgins, counsel for Respondent herein. I further certify that all parties required to be served have been served.



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APPENDIX

A Memorandum Opinion and Order for the United States District Court for the Northern District of Texas - Dallas Division dated August 28, 2000.

B Order from the United States Court of Appeals for the Fifth Circuit filed on March 2, 2001.

C (Order) On Petition for Rehearing from the United States Court of Appeals for the Fifth Circuit filed on March 29, 2001.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JOSE ANTONIO GUZMAN	§
	§
Plaintiff,	§
	§ 3:99-CV-0659-R
	§
FEDERAL EXPRESS	§
CORPORATION,	§
	§
Defendant.	§

MEMORANDUM OPINION AND ORDER

Plaintiff Jose Antonio Guzman ("Plaintiff") filed suit against Defendant Federal Express Corporation ("Defendant") on March 25, 1999 alleging violations of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12112(a). Plaintiff also alleges that Defendant terminated Plaintiffs employment in retaliation for Plaintiffs attempts to enforce Plaintiff's alleged ADA claims, Now before this Court is Defendant's Motion for Summary Judgment (filed April 26, 2000). For the reasons stated below, Defendant's motion is GRANTED.

I. BACKGROUND FACTS

Plaintiff, who was employed as a full-time ramp transport driver for Defendant, was diagnosed with hystiocytosis in 1995. This condition seems to manifest from an inoperable pituitary tumor discovered in 1988. On the night of February 15, 1998, Plaintiff had a suspected seizure due to hystiocytosis while Plaintiff was asleep at home. Plaintiffs doctor prescribed medication and determined that Plaintiff would not be able to drive professionally for two years.

On March 13, 1998, Plaintiff's doctor released Plaintiff to return to full work activities with the exception of driving. Thereafter, Defendant offered Plaintiff several positions, including one fulltime position as a freight handler, a job which offered identical pay to Plaintiff's former position. However, Plaintiff rejected this offer because it required Plaintiff to

spend 18 months in a different department. In March of 1999, Defendant assigned Plaintiff to the Temporary Return to Work ("TRW") program, under which any employee on temporary leave who is unable to perform the full range of his regular job duties can participate in a temporary job for 90 days, after which the employee returns to medical leave status. Defendant's policies state that the TRW program is mandatory for any employee who is assigned to it. However, Plaintiff refused to participate the TRW program. Defendant repeatedly encouraged Plaintiff to return to work under the TRW program but to no avail. Finally, on March 31, 1999, Defendant terminated Plaintiff's employment. Plaintiff alleges that his termination violates the ADA. Defendant filed the present motion on April 26, 2000. For the reasons stated below, Defendant's motion succeeds.

II. ANALYSIS

A. Summary Judgment Standard

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitle to a judgment as a matter of law." Fed. R. Civ. *P.* 56(c). "[T]he substantive law will identify which facts are material." *Anderson v. Liberty Lobby,* Inc., 477 U.S. 242, 248 (1986). The moving party through the motion for summary judgment and evidence on file show the court that there is no genuine material fact issues. Once the movant makes this showing, the nonmoving party must then direct the court's attention to evidence in the record sufficient to establish that there is a genuine issue of material fact for trail. The court must view the evidence in a light most favorable to the nonmoving party. If the nonmoving

party does not show sufficient evidence to establish the existence of an element essential to her case then the moving party is entitled to summary judgment as a matter of law. *See Celdlex Corp. v. Catrett,* 477 U.S. 317, 323 (1986).

B. ADA

"The ADA prohibits discrimination by covered entities, including private employers, against qualified individuals with a disability." *Sutton v. United Air Lines, Inc.,* 144 L.Ed.2d 450, 459 (1999). "To establish a prima facie case under the ADA one must show: (1) that he has a disability; (2) that he was qualified for the job; and (3) that he was subject to an adverse employment decision because of his disability." *Ivy v. Jones,* 192 F.3d 5 14, 516 (5th Cir. 1999). Plaintiff's ADA claim fails under the very first element of the prima facie case requirement because Plaintiff has not established that he was disabled at the time Plaintiff was terminated.

A "disability" for purposes of the ADA is defined as: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual, (B) a record of such an impairment; or (C) being regarded as having such an impairment." *Sutton,* 144 L.Ed.2d at 459-60. Plaintiff argues that his case qualifies under the third definition of a "disability" because Defendant allegedly regarded Plaintiff as being disabled due to Plaintiffs seizure. The Supreme Court has stated that "a person is 'regarded as' disabled within the meaning of the ADA if a covered entity mistakenly believes that the person's actual, non-limiting impairment substantially limits or more major life activities. *Murphy v. United Parcel Service, Inc.,* 144 L. Ed.2d 484, 490 (1999). The *Murphy* Court went on to note that "the Equal Employment Opportunity Commission (EEOC) defines 'substantially limits' as: 'significantly restricted in the ability to perform either a class of jobs

or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities.'" Id. at 491 (citing 29 C.F.R. § 163(j)(3)(i)).

In *Murphy,* the plaintiff, Vaughn L. Murphy ("Murphy"), was employed as a mechanic by the defendant, United Parcel Service, Inc. ("UPS").[1] As part of his job, Murphy was required to drive commercial motor vehicles. In order to drive such vehicles, however, Murphy had to satisfy certain Department of Transportation ("DOT"') health requirements, one of which stipulated that no driver of a commercial motor vehicle in interstate commerce have a current clinical diagnosis of high blood pressure. Murphy suffered from high blood pressure since the age of 10, and his blood pressure was well-beyond the parameters set out the DOT regulations. However, Murphy was erroneously

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[1] The following facts of the *Murphy* opinion can be found at 144 L.Ed.2d at 488-89.

granted certification. When UPS noticed the error, it retested Murphy, found his blood pressure to be too high, and terminated his employment. Murphy filed suit under the ADA, claiming that he was disabled under the ADA because UPS regarded Murphy as disabled.

In rejecting Murphy's argument, the Supreme Court held that "to be regarded as substantially limited in the major life activity of working, one must be regarded as precluded from more than a particular job." Id. at 49 1. Accordingly, the *Murphy* Court concluded that Murphy only demonstrated his inability to perform the specific job of being a mechanic when such work involves driving a commercial motor vehicle and that Murphy did not establish his inability to perform a class of other jobs. *See Id.* at 492. Consequently, the Supreme Court found that Murphy is not disabled for purposes of the ADA.

In light of *Murphy,* this case becomes a proverbial slam-dunk in favor of Defendant. Ironically, Plaintiff states in his Response to Defendant's Motion for Summary Judgment that "Defendant has *never claimed* that Plaintiff was incapable of performing these other jobs and it cannot be denied that he made numerous requests for such a job." (Emphasis added). In other words, Plaintiff has just admitted, in so many words, that Defendant did not regard Plaintiff as being disabled.

Plaintiff argues instead that Defendant was required to make an effort to find other jobs for Plaintiff The Court offers two responses to this argument. First, nowhere in *Murphy* did the Supreme Court mention that UPS was required to find Murphy a mechanic position which did not require operating a commercial motor vehicle. In other words, there is no such requirement under the ADA., especially where the claimant is not

disabled under the act. Second, Defendant did make an effort to locate other jobs for Plaintiff. In fact, Defendant even offered Plaintiff a full-time freight-handler position. This position offered identical pay to Plaintiff's former position. Plaintiff turned this offer down. The Court sees no wrong-doing on Defendant's part.

The foregoing analysis has demonstrated that Plaintiff was not regarded as disabled by Defendant, and, therefore, Plaintiff does meet the definition of someone with a disability under the ADA. Accordingly, Plaintiff has no ADA claim. Thus, Summary judgment is GRANTED as to Plain tiff s ADA claim.

C. Retaliation

In analyzing a claim of retaliation under the ADA, Courts apply the burden-shifting framework found in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), whereby the plaintiff must first state a prima facie case of retaliation, following which the defendant

must come forward with a legitimate, nondiscriminatory reason for the adverse employment action. See *Sherrod v. American Airlines, Inc.*, 132 F.3d 1112, *1121-22* (5th Cir. 1998). To establish a prima facie case of retaliation, Plaintiff must prove: (1) that he engaged in protected activity; (2) that an adverse employment action occurred; and (3) that a causal link existed between the protected activity and the adverse employment action. *See Id.* at 1122 n.8. Plaintiff once again falls to establish a prima facie case. There is no dispute that Plaintiff engaged in protected activity by filing a charge of discrimination with the EEOC. Further, it is undisputed that Plaintiff was terminated from his employment with Defendant. However, Plaintiff has failed to establish a causal link between these two activities.

In response to Plaintiffs retaliation claim, Defendant maintains that Plaintiff was terminated

because of his refusal to participate in the TRW program. Plaintiff argues that (1) the TRW program was not mandatory, (2) Defendant refused to answer Plaintiff s questions about the program, and (3) Defendant timed its attempt to place Plaintiff in the TRW program in such a way as to ensure that Plaintiff would not participate and would therefore be terminated. Needless to say, these arguments by Plaintiff are shockingly weak. First, the Court, having read Defendant's guidelines regarding the TRW program notes the passage entitled "Employee Refusal" which states: The TRW program is not voluntary. Employees assigned to the TRW program must participate." It then goes on to warn that any employee who refuses to participate may be terminated. How Plaintiff has concluded that the TRW program is voluntary is quite puzzling to this Court.

As to Plaintiffs second argument, Plaintiff has pointed to no case or statute that says that an employer must answer all employee questions regarding mandatory temporary work placements. Finally, Plaintiff argues that Defendant's timing of the TRW issue was designed to culminate in Plaintiff s termination. The Court thinks that Plaintiff gives Defendant too much credit. There is no evidence to suggest that Defendant raised the TRW issue knowing for certain that Plaintiff would refuse and, therefore, be terminated. Plaintiff seems to think that Defendant is clairvoyant and can predict the actions of its employees before the employees themselves can. It goes without saying that this argument is unfounded and wholly lacking in merit. Because Plaintiff has failed to establish even a scintilla of evidence suggesting a causal link between his termination and his filing of a discrimination action with the EEOC, Defendant's

Motion for Summary Judgment is GRANTED as to Plaintiff's retaliation claim.

III. CONCLUSION

For the foregoing reasons, Defendant's motion is GRANTED. It is so ORDERED.

Signed this 28th day of August, 2000.

CHIEF, JUDGE JERRY BUCHMEYER
UNITED STATES DISTRICT COURT

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 00-11072
Summary Calendar

JOSE ANTONIO GUZMAN,

Plaintiff - Appellant,

versus

FEDERAL EXPRESS CORP.,

Defendant - Appellee.

Appeal from the United State District Court for
the Northern District of Texas
(USDA No. 3-99-CV-659-R)

Before REAVLEY, DeMOSS and BENAVIDES, Circuit Judges.

PER CURIAM: *

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* Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

Jose Antonio Guzman appeals from the summary judgment against him on his claims under the Americans with Disabilities Act. We agree with the district court. Guzman's discrimination claim must fail because he offers no evidence that he had a disability or was regarded as having a disability at the time he was fired. See Murphy v. United Parcel Serv., Inc., 527 U.S. 516, 523-25 (1999). Rather, he was merely unable to drive and was regarded as only being unable to drive. Guzman's retaliation claim must also fail because he cannot show a causal link between his suit and his termination. See Sherrod v. American Airlines, Inc., 132 F.3d 1112, 1122 (5th Cir. 1998) (requiring but-for causation).

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 00-11072

JOSE ANTONIO GUZMAN

Plaintiff - Appellant

v.

FEDERAL EXPRESS CORP

Defendant - Appellee

Appeal from the United States District Court for the Northern District of Texas, Dallas

---

ON PETITION FOR REHEARING

Before REAVLEY, DeMOSS, and BENAVIDES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

REHG-2

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2000

JOSE ANTONIO GUZMAN, *Petitioner*

v.

FEDERAL EXPRESS CORP., *Respondent*

AFFIDAVIT OF MAILING
PETITION FOR A WRIT OF CERTIORARI

Frank L. Broyles, being duly sworn, deposes and says:

I am a member of the Bar of the Supreme Court of the United States.

On June 25, 2001, at approximately 4:00 p.m., I deposited in the mailbox in Dallas, an envelope addressed to the Clerk of the Supreme Court of the United States, first-class postage prepaid, containing 43

copies of the petition for certiorari in the above-entitled case.

Frank L. Broyles
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Counsel for Petitioner

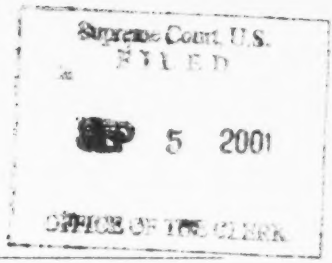
SUBSCRIBED AND SWORN TO before me this 25th day of June, 2001.

Notary Public

My Commission Expires:

(2)

No. 01-16



IN THE SUPREME COURT OF THE UNITED STATES

JOSE ANTONIO GUZMAN, *Petitioner*

v.

FEDERAL EXPRESS CORP., *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT 3

TABLE OF AUTHORITIES 4

ARGUMENT AGAINST GRANTING CERTIORARI 5

STATEMENT OF FACTS 9

CONCLUSION 20

CERTIFICATE OF SERVICE 22

CORPORATE DISCLOSURE STATEMENT

FedEx Corporation, f/k/a FDX Corporation, is the Parent Corporation of Respondent Federal Express Corporation.

TABLE OF AUTHORITIES

FEDERAL CASES

Murphy v. UPS, 119 S. Ct. 2133 (1999) 5, 6, 7, 20

...

COURT RULES

SUPREME COURT RULE 10 .....5, 20.

ARGUMENT AGAINST GRANTING CERTIORARI

The respondent Federal Express Corporation submits that the petition for writ of certiorari should be denied because there are no compelling reasons for granting the requested review. In fact, while not controlling, the petition does not meet any of the criteria specified in Supreme Court Rule 10. Furthermore, Petitioner's stated justification for requesting certiorari is based on misstated facts and a fundamental misunderstanding of the rationale applied in the lower courts. Contrary to Petitioner's assertion, Petitioner has failed to demonstrate that this Court's holding in *Murphy v. U.P.S.*, 119 S. Ct. 2133 (1999) requires clarification, or is otherwise misunderstood or confusing to the lower courts. Petitioner is simply unhappy with the result in his particular case.

Petitioner originally filed suit alleging, inter alia, that Respondent discriminated against him and terminated his employment because he was "regarded as" disabled. In granting summary judgment in favor of Respondent, the

United States District Court for the Northern District of Texas applied the holding in *Murphy* and held that because Respondent only disqualified petitioner from a single job, and because Respondent in fact offered Petitioner at least one other position, Respondent did not regard Petitioner as disabled. The Fifth Circuit Court of Appeals affirmed summary judgment in favor of Respondent.

Petitioner asserts that the Fifth Circuit was confused by this Court's discussion of the "regarded as" prong of a claim under the American's with Disabilities Act and that without clarification of the appropriate standard, "a major portion of the ADA will be rendered meaningless." Specifically, Petitioner alleges that the lower courts "did not understand that *Murphy* dealt with only a single job and that the entire purpose of the 'regarded as' section of the definition is defeated if the employer can ban the employee with an impediment from all its jobs because he has an infirmity that prevents him from performing his single job." Petition at p. 22.

This statement of Petitioner is based on his mistaken reliance on a severely twisted version of the facts. In essence, Petitioner argues that Respondent placed unusual conditions on him when offering him alternative positions which were compatible with Petitioner's medical condition, and that these conditions were "knowingly designed to be unacceptable to him." Petition at p. 21. Petitioner then argues that because conditions were placed on the offers of other positions, Respondent must have regarded Petitioner as incapable of performing all of its jobs. This argument is nonsensical and ridiculous. Furthermore, as set out more completely below, the evidence clearly demonstrates that Petitioner was offered alternative employment and that Respondent did not regard him as disabled.

In addition, Petitioner makes a statement in his brief which proves that this case does not warrant the granting of a writ of certiorari. In summarizing the opinion of the Fifth Circuit and its reliance on *Murphy*, Petitioner states: "The Murphy case, when correctly read, says no such thing . . ."

Petition at p. 22. The fact that in Petitioner's opinion, the *Murphy* decision is capable of being correctly read militates against Petitioner's claim that certiorari is warranted. Moreover, contrary to Petitioner's assertion, it is apparent from the opinion itself that the *Murphy* case involved only the plaintiff's exclusion from a single job for medical reasons. That is precisely the fact situation involved in the case at bar. Petitioner does not dispute that he was not physically qualified for his former position as a commercial truck driver due to his seizure episode. Petitioner was offered at least one other position that did not conflict with this restriction; however, Petitioner refused the position. The lower courts correctly determined that Respondent satisfied its burden under the ADA and that it did not regard Petitioner as disabled.

In order to set the record straight in the event this Court grants the Petition, the following is Respondent's rendition of the facts of this case.

STATEMENT OF FACTS

A. GUZMAN'S EMPLOYMENT WITH FEDEX

Guzman (Petitioner) drove an "18 wheeler" for FedEx. (R. 568). He worked a full-time job as a "ramp transport driver" at FedEx's DTK station, which is located in Irving, Texas; there, he worked the early a.m. shift transporting, delivering, and picking up heavyweight freight. (R. 519, 600). He was an at-will employee. (R. 519, 600, 611).

B. GUZMAN'S MEDICAL EVENT

On February 15, 1998, Guzman suffered some sort of medical event; it has been alternately called a "seizure," "suspected seizure," and Guzman's present condition." (R. 619, 620, 755). Regardless of the label, Guzman stipulates that as a result of this medical event, he could not drive professionally for two years. (R. 581). Also based on this medical event, Guzman's doctor had him take time off from work.

FedEx learned of this event from Guzman and his doctor (R. 688, 703, 755). This includes the assertion from Guzman's doctor that Guzman "has been disabled." (R. 701).

C. GUZMAN'S LEAVE OF ABSENCE

Based on the information provided by Guzman and his doctor, FedEx placed Guzman on a medical leave of absence. Guzman's medical leave was consistent with FedEx's written leave of absence policy. (R. 600).

On March 19, 1998, Val Parrish, FedEx's Human Capital Manager, gave Guzman written notice of terms and conditions of FedEx's leave of absence polity, including Guzman's responsibilities under this policy. (R. 599, 615). In the last paragraph of this letter, Parrish specifically notified Guzman that FedEx had a temporary return to work ("TRW") program:

> Part time and full time employees are eligible to participate in the Temporary Return to Work Program. This would allow part time employees to work up to 21 hours per week or full time employees to work up to 28 hours

> per week if your physician releases you to light duty and there is light duty available in your work group .... (R. 615).

D. GUZMAN REFUSES TO RETURN TO WORK, INSISTING ON A FULL-TIME JOB[1]

On March 13, 1998, Guzman's treating physician gave him a written release to return to work. (R. 618). This release, however, contained two restrictions. First, Guzman's doctor told him in writing that he could work only "in day time hours." (R. 618). Second, Guzman's doctor told him in writing, "You should be in a non-driving position." (R. 537, 618). Guzman's doctor wrote similar releases on May 12, 1998, and on June 19, 1998. (R. 619, 620).

During Guzman's leave of absence, Parrish continually looked for a position for Guzman. (R. 601). As

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[1] Guzman acknowledged in his deposition that "all jobs are bid unless you are in management." (Among other things, a "bid" is a written application.) Despite this knowledge, and despite what he calls on page 4 of his Brief his "familiarity with most of the various jobs the Company

shown below, however, Guzman was adamant that he work in a full-time position; Guzman made it clear that he did not want to work in a part-time position. (R. 601).

1. Guzman Rejects FedEx's First Offer

In May of 1998, Parrish offered Guzman a job as a Customer Service Agent ("CSA"). (R. 600). There is no dispute that the job was consistent with the instructions of Guzman's treating physician. (R. 600). However, the CSA job was part time. (R. 600). Guzman rejected this offer because he insisted that FedEx give him a full-time job. (R. 600, 601).

2. Guzman Rejects FedEx's Second (Full time) Offer

On November 10, 1998, Parrish extended another job offer to Guzman. (R. 601). This time, the offer was made in writing. (R. 621). The job that Parrish offered to Guzman was entitled, Freight Handler (Non-DOT). (R. 601). This

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had in the Dallas area," Guzman never submitted a written application or "bid" for another position during his entire leave of absence.

job had the following features, which made it seem like a good fit for Guzman:

- ✓ *First,* the job was a full-time job, which is what Guzman had insisted on for months. (R. 601).
- ✓ *Second,* the job was within Guzman's education and experience. (R. 601).
- ✓ *Third,* the job was consistent with the instructions of Guzman's health care provider. (R. 619, 620).
- ✓ *Fourth,* the job was in Dallas-Fort Worth area (the DTK-RT station). (R. 601). Indeed, this job was in the very same department where Guzman worked before February 16, 1998. (R. 520).
- ✓ *Fifth,* the job paid the same salary as his previous job driving an "18-wheeler." (R. 601).

Page 6 of Guzman's summary judgment response puts it best: "[t]his was the same type work [Guzman] had been doing as a driver – without the driving." (R. 482).

What Parrish asked in return was that Guzman stay for 18 months in that department (R. 601); however, as previously noted, this was the very same department where Guzman worked before February 16, 1998. Even this term

was mitigated by the fact that Guzman was eligible to apply for any other job within that department after six months. (R. 601). This eligibility included driving jobs (once his driving restrictions were lifted). (R. 520).

Guzman refused this offer, too. (R. 601, 625). This time, Guzman's refusal came in the form of a letter from his attorney, who offered the following explanation for Guzman's refusal:

> He [does] not desire to expect [sic] that position as offered, primarily because of the eighteen (18) month commitment and other commitments required of him if he did so. (R. 625).

The letter does not identify these "other commitments."

3. *Guzman Rejects TRW Assignment*

On March 8, 1999, Parrish sent Guzman a letter notifying him of a temporary return to work ("TRW") assignment at FedEx's DTK facility. (R. 629) (Prior to the seizure, Guzman worked at the DTK facility.) The TRW assignment was consistent with FedEx policy that Parrish

had explained to Guzman in a letter almost one year earlier. (*See* last paragraph of letter dated March 19, 1998, discussed previously.) (R. 599, 615). The TRW assignment was also consistent with the limitations imposed by Guzman's treating physician. (R. 619, 620). Finally, the TRW assignment guaranteed to Guzman compensation that was equal to his disability insurance benefit. (R. 521, 602).

Parrish's letter of March 8, 1999 also contains the following admonition:

> **The TRW Program is not voluntary. Employees assigned to the TRW Program must participate.**

(emphasis added). (R. 629). Parrish's letter goes on to cite written policy, which provides that employees who are absent without notifying their manager or member of management in their work area are treated as if they have voluntarily resigned their employment. (R. 629).

Guzman refused to work in the TRW program as instructed. In communicating his refusal, Guzman did not provide any doctor's instructions showing that he was unfit

to work. Nor did Guzman provide any other reason why he was unable to comply with Parrish's instructions.

Plaintiff's Summary Judgment Response states that Guzman elected not to file an internal grievance – called a GFTP – over any of the terms of the TRW program (R. 489). Logically, this would include whether the TRW Program is mandatory of permissive. Also, Guzman never challenged Parrish's assertion that the TRW program was mandatory before the EEOC.

Following up Guzman's refusal to participate was a letter from his attorney, dated March 15, 1999. (R. 708). In this letter, Guzman's lawyer wrote that "there are too many unanswered questions for him to accept the part-time, temporary job that has been offered." (R. 708). Also, in this letter, Guzman's lawyer reiterated his client's insistence on having nothing less than "a full-time job with full-time benefits."

Despite Guzman's refusal, Parrish made another effort to explain the TRW program to Guzman. (R. 630-32).

Dated March 22, 1999, Parrish's letter outlines pay, benefits, and other features. It also reiterates the following: **Participation in the TRW Program at FEDEX is MANDATORY.** (emphasis in original). (R. 632).

Parrish wrote still another letter, this one dated March 24, 1999. (R. 633-34). Once again, Parrish stated:

> Tony in my 03/08/99 letter, I explained Temporary Light Duty is not voluntary. Employees assigned to the TRW program must participate. (R. 633)

Parrish's letter went on to warn Guzman:

> You are considered as on unauthorized absence/leave of absence. Each day of absence since March 10, 1999 will be calculated into your attendance. (R. 633)

This letter practically plead with Guzman to participate:

> Tony, it is imperative that you understand you are in violation of Medical Absence/Medical Leave of Absence Policy, P&P 1-5, Acceptable Conduct Policy, P&P 2-5. Your failure to return to

> work Temporary Light Duty jeopardizes your STD/LTD medical benefits and disciplinary action up to and including termination will result. (R. 633)

In this letter, Parrish tried to give Guzman what page 12 of his summary judgment response called "one last opportunity to report for temporary duty[.]" (R. 488). Specifically, Parrish instructed Guzman to show up at ten o'clock in the morning on March 26 at the DTK ramp (his old work place). R. 633). Parrish's letter closes by stressing the urgency of the situation:

> ***Once again, participation in the TRW Program is mandatory. Failure to comply with my request will result in your Leave of Absence Status being in jeopardy. I have also attached a copy of the Medical Absence/Leave of Absence Policy, P&P 1-5 and Temporary Light Duty Policy, P&P 1-68. Failure to return to work or provide medical documentation substantiating your absence can result in discipline up to and including termination.*** (emphasis in original). (R. 634).

Guzman responded to Parrish's letters of March 22 and 24 by suing FedEx. In a letter dated March 26, 1999, Guzman – again, through his lawyer – attempted to justify his refusal to comply with Parrish's instructions by asserting that he is entitled to nothing less than a full-time job. (R. 635). Guzman's attorney then stated:

> It is apparent that the Company is treating Mr. Guzman as a disabled employee.... Regarding an employee as disabled is treated the same under the Americans With Disabilities Act ("ADA") as though the employee were actually disabled – which requires reasonable accommodation by the Company. (R. 635).
>
> Mr. Guzman filed a Charge With the Equal Employment Opportunity Commission complaining of the Company's violation of ADA....[2]

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[2] The EEOC Charge, filed on January 11, 1999, reads in pertinent part:

> I have been continuously denied a reasonable accommodation in that I have been denied the opportunity to return to work in a full-time non-driving position. .... I believe I have been and continue to be discriminated against because the company regards me as a person with a disability ... in that I have been denied the opportunity to return to work in a full-time non-driving position. (R. 662).

> Yesterday, Mr. Guzman filed suit.... (R. 636).

Citing Guzman's repeated refusals to comply with instructions, Parrish wrote a letter to Guzman on March 31, 1999, informing him that his employment was terminated. (R. 637). In the same letter, Parrish advised Guzman that if he in good faith believed this termination was unfair, Guzman could use FedEx's internal grievance procedure, the GFTP process. (R. 637). Guzman never did.

CONCLUSION

Petitioner has failed to demonstrate that this case warrants the rather extreme measure of granting a writ of certiorari. This Court's opinion in *Murphy v. UPS* does not require clarification. Supreme Court Rule 10 provides that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." At worst, Petitioner has only demonstrated that he is dissatisfied with the factual conclusion reached by the lower courts that

Petitioner was indeed offered other employment by Respondent, and that as a result of that factual finding, Respondent obviously did not regard Petitioner as disabled.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Stephen R. Cochell, a member of the Bar of this Court, hereby certify that on this 5th day of September, 2001, three copies of the Brief in Opposition to Petition for Writ of Certiorari were mailed, first class postage prepaid, to counsel for Petitioner, addressed as follows:

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